RECORD AND BRIEFS

Nos. 16-476, 16-477

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In The
Supreme Court of the United States

CHRISTOPHER J. CHRISTIE,
GOVERNOR OF NEW JERSEY, et al.,

Petitioners,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,

Respondents.

NEW JERSEY THOROUGHBRED
HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* RESEARCHER JOHN T. HOLDEN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus is a visiting scholar at Florida State University. He has a research focus on sports gambling policy and has published numerous law review and peer-reviewed articles addressing matters associated with sports gambling. He has a particular interest in the interaction between Federal and State gambling policies. As a researcher in the field, *Amicus* has a unique perspective on gambling policy and the historical relationship between the States and the Federal government in this area. *Amicus* has provided his institutional affiliation for identification purposes only, and implies no institutional endorsement.

SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals' *en banc* interpretation of the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 (PASPA), has impermissibly expanded the scope of Federal powers so as to prevent States from modifying or repealing their own statutes. Requiring the State of New Jersey

[1] Pursuant to Supreme Court Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of *amicus curiae* briefs, in support of either party or of neither party.

to maintain its own provisions prohibiting sports gambling forces the State to employ their police powers to effectuate Federal policy. The commandeering of New Jersey's ability to repeal its own laws is incompatible with this Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

The determination of the Third Circuit that the law which New Jersey passed in 2012, N.J. STAT. §§ 5:12A-1-5:12A-6, was rightfully preempted by PASPA and did not violate the anticommandeering doctrine raises meaningful questions about the rights of the States. *Nat'l Collegiate Athletic Ass'n v. Christie*, 730 F.3d 208 (3d Cir. 2013) (hereinafter "*Christie I*"). However, the Third Circuit's later *en banc* determination in 2016 that New Jersey was bound in perpetuity to maintain its ban on sports wagering with no ability to modify its statutes is beyond the scope of the Federal government's powers. *Nat'l Collegiate Athletic Ass'n v. Christie*, 832 F.3d 389 (3d Cir. 2016) (hereinafter "*Christie II*"). The Federal government cannot require a State to enforce its own laws. The powers of the States and Federal governments are separate and unequal, with the Federal government confined to enforce its own laws, without conscripting either state legislatures or state officers. *See Printz v. United States*, 521 U.S. 898, 935 (1997).

The Federal government is forbidden from forcing States to enact any law or requiring State officials to enforce Federal law within the officials' own State. *Printz*

v. United States, 521 U.S. 898, 912 (1997). The extension thereof is that the Federal government cannot utilize Federal law to prohibit States from repealing, in part or in whole, their existing regulations thereby commandeering the State legislative process. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 103 (2015). The Federal government is able to utilize its law making and enforcement authority free from State-level interference; however, the Federal government cannot commandeer or dictate how States regulate private conduct. The Federal government has power to regulate conduct beyond impermissibly "seeking to control or influence the manner in which States regulate private parties." *Reno v. Condon*, 528 U.S. 141, 151 (2000).

Indeed, if the Federal government so desired, it could preempt the field of sports gambling and regulate it exactly as Congress so desires to the extent it implicates interstate commerce; however, that is not what PASPA does. There is no Federal regulatory regime for States to default to in the case of sports gambling, making this case distinct from this Court's prior anticommandeering cases. *See, e.g.*, *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742 (1982); *see also Hodel v. Va. Surface Min. & Reclamation Ass'n Inc.*, 452 U.S. 264 (1981). Indeed, as Circuit Judge Fuentes noted in dissent in *Christie II*, the majority's decision would seemingly allow New Jersey to initiate a full repeal only to begin immediately adding restrictions, such as requiring bettors to be 21 years old. The majority's decision distinguishes the act of repeal and

replace from partial repeal despite both reaching precisely the same conclusion. *See* Pet. App. 32a (Fuentes, J., dissenting) ("Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a state from restricting sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.").

The Federal government has a limited number of ways to entice State cooperation with Federal objectives. For instance, the Spending Clause, U.S. CONST. art. I, § 8, cl. 1, enables the Federal government to encourage states to comply with Federal programs through the awarding of funding for related projects. *See South Dakota v. Dole*, 483 U.S. 203 (1987). The Federal government could quite conceivably tie the awarding of public health funds to prohibiting sports gambling, but it does not. The Federal government has the ability to use various preemptive tools to displace inconsistent State law. PASPA could be weaponized to stop sports gambling, but this is not the case with New Jersey's 2014 repeal. In the case of the 2014 repeal, PASPA operates as a form of "illusory preemption," where at first glance it appears the statute may rightfully displace inconsistent State statutes, but because

New Jersey has repealed various sections of law, notably those that would be preempted, a conflict becomes impossible. As this Court has articulated, State law provisions that conflict with Federal law are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Perhaps the broadest means of preemption – field preemption – exists where "Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109 (1992) (Kennedy, J., concurring in part and concurring in the judgment). This is not the approach Congress has taken with respect to sports gambling.

Alternatively, Congress can expressly preempt State laws by indicating its intent to do so within the "statute's express language or through its structure and purpose." *Altria Grp., Inc. v. Good*, 129 S. Ct. 538, 540 (2008). However, PASPA contains no such provision indicating an intent to override statutes that were in existence prior to the statute's passage–only those arising following a one-year window after passage. *See* 28 U.S.C. § 3704(a)(3)(A). Finally, Federal law will prevail if State law is inconsistent with Federal law. *See Gibbons v. Ogden*, 22 U.S. 1 (1824). While the affirmative act by New Jersey to pass N.J. STAT. § 5:12A-1-5:12A-6 in 2012 may have been preempted due to a conflict with PASPA, the 2014 act of repealing and thus eliminating portions of existing State laws cannot conflict with PASPA (or any other Federal law) because it is as though those provisions of the State law do not exist. The only way PASPA preempts the New Jersey

law is through the creation of a special, previously unheard of "illusory preemption," whereby Federal law trumps non-existent State law provisions. Congress could enact a Federal sports gambling regime, and either task an existing agency such as the Commodities and Futures Trading Commission (CFTC) or the Federal Trade Commission (FTC) with oversight, or create a new Sports Gambling Regulatory Commission, but Congress has not done so. Instead, Congress has relied on the States to maintain their laws forever, and use State law enforcement officers acting as the administration mechanism for the Federal policy preferences in this area, without regard for the autonomy of the States to change their policy preferences.

The regulation of gambling activities in America has historically been a local and State matter. Gambling regulations date back to before the middle of the Eighteenth Century, with colonies and later States relying on gambling activities to raise revenue for the advancement of projects which served the local community. These funds have been used for such projects as founding Columbia University, as well as creating a base of funds for expansion at many of the country's other prestigious universities. HERBERT ASBURY, SUCKER'S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA 72-74 (Thunder's Mouth Press 1938). The Federal statutory apparatus that implicates sports gambling is designed, with the exception of PASPA, to support States in the enforcement of their own laws. For instance, the Federal Wire Act requires a predicate violation of State law for the statute to be triggered. *See*

18 U.S.C. § 1084(b). A similar provision is found in the Illegal Gambling Business Act, one of the most powerful and widely applicable Federal statutes in this area, which requires "a violation of the law of a State or political subdivision in which it is conducted" for the statute to be triggered. 18 U.S.C. § 1955(b)(1)(i). More recently enacted statutes have continued to recognize the traditional place of States in regulating the indulgences of their population. The Unlawful Internet Gambling Enforcement Act contains a rule of construction stating that "[n]o provision of th[e] subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). Even tangentially-related Federal statutes such as the Sports Bribery Act, which does not require gambling related activity to be implicated, notes Congress' intent to allow "local authorities," at minimum, equal jurisdiction over offenses. *See* 18 U.S.C. § 224(b). These example statutes leave PASPA's application to the New Jersey repeal as a Federal outlier, an outlier that champions a sort of "Faux Federalism," where Congress has neither provided a system for regulation nor used a recognized form of preemption to control the matter before this Court.

The Third Circuit's interpretation of PASPA in *Christie I* creates an unnecessarily broad classification of sports gambling that by default implicates Congress' ability to regulate interstate commerce. Some sports

gambling schemes undoubtedly implicate the Commerce Clause; for instance there is likely no dispute that Nevada's gambling industry has a substantial impact on interstate commerce and much of the State is supported by out-of-state tourism. The regulation of modern gambling infrastructure is far different (*e.g.*, geo-controlled online access) from the interstate transportation of lottery tickets, which this Court found to implicate the Constitution's Commerce Clause in 1903. *See Champion v. Ames*, 188 U.S. 321 (1903). The determination that sports gambling implicates the Commerce Clause by default is inconsistent with the Respondents' position articulated during oral argument at the Third Circuit. Specifically, that a repeal where individuals could wager up to $1,000 between friends and family would be the type of partial repeal of New Jersey law that would not implicate PASPA, with the implication being that the stakes were too small to trigger the Commerce Clause. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (3d Cir. 2016) (Nos. 14-4546, 14-4568, 14-4569). There is seemingly a degree to which sports gambling can exist and not implicate the Commerce Clause if Respondents are correct in their interpretation of the statute. The Third Circuit's overly broad interpretation of the reach of PASPA and the concession by Respondents that PASPA does not extend to all forms of sports gambling are indicative of PASPA's poor construction.

Indubitably, PASPA is a problematic statute. PASPA requires the States to utilize their police powers to enforce Federal policy and prohibits State legislatures

from exercising their constitutionally protected autonomy. The Federal commandeering of New Jersey's legislative process is being puppeteered through an illusory regulatory scheme that lacks a truly preemptive affect. PASPA's authorization of Federal and private intrusion into the State legislative process is an affront to years of federally recognized State autonomy in the regulation and classification of gaming activities. PASPA also categorizes broad categories of activities as within the regulatory scope of the Commerce Clause despite the States' ability to confine many schemes to an intrastate framework.

ARGUMENT

I. The Professional and Amateur Sports Protection Act Impermissibly Commandeers State Police Powers

The dual sovereignty system established by the Constitution was designed to create a Federal government of limited powers, with substantial authority reserved for the States. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As Madison articulated, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, 227 (Madison) (Dover Thrift ed. 2014). Madison would elaborate that the dual sovereignty system creates "a double security" for the rights of the people, with both the Federal and State governments serving as a check on one another.

See THE FEDERALIST NO. 51, 255 (Madison) (Dover Thrift ed. 2014). The separation of powers between the State governments and the Federal government is essential to the constitutionally proper functioning of the nation. PASPA's application against New Jersey's repeal of portions of its law offends this historical separation. The Respondents, acting under authority of the Federal government, abscond with New Jersey's sovereign right to regulate their citizenry in the absence of lawful Federal authority. *See* 28 U.S.C. § 3703.

The Tenth Amendment does not allow the Federal government to dictate how States are to govern their citizens. In *New York v. United States*, this Court stated that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)). Relatedly, this Court has held "that state legislatures are not subject to federal direction." *Printz v. United States*, 521 U.S. 898, 912 (1997) (emphasis omitted) (citing *New York*, 505 U.S. 144). State governments are free to pass laws criminalizing conduct, as they are also free to remove their laws from the books and remove criminal penalties. The Federal government cannot require that a State continue to enforce a State law that is no longer desired by the State yet is in line with Federal policy preferences; however, that is the very essence of what is taking place in this case. The Respondents, who have shared enforcement authority under PASPA with the Attorney General of the United States, are attempting to hijack the State legislative

powers of New Jersey to maintain a policy that serves their private needs rather than the citizens of New Jersey.

Prior to its passage, PASPA raised Federalism concerns. W. Lee Rawls, Assistant Attorney General, noted that how States generate revenue is a matter that has historically been outside the purview of the Federal government, and the proposed statute "raises federalism issues," relating to incursions into roles typically played by the States. *See* Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph W. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). The concern over PASPA's abridgement of States' rights was highlighted in the Senate Report prepared in association with the statute. Senator Grassley stated that the argument that sports wagering was somehow distinct from other State-level revenue generating wagering programs was misguided, and "this legislation would set the dangerous precedent that the Federal government can prohibit any State revenue raising program, under the guise of 'interstate commerce,' at the behest of any special interest." S. REP. NO. 102-248, at 12 (1991). Senator DeConcini acknowledged that opponents of the bill he then championed had argued that the proposed legislation intruded on the rights of States to raise revenue. Senator DeConcini would state "[t]he answer to State budgetary problems should not be to increase the number of lottery players or sports bettors, regardless of the worthiness of the cause." *See* 138 CONG. REC. 12973 (June 2, 1992) (Sen. DeConcini). While the

Senator from Arizona may very well have an informed opinion as to the revenue-generating worthiness of State-sponsored sports lotteries it does not diminish the fact that these are matters left for State legislators to decide. The Federal intrusion into the sovereign domain of the New Jersey legislature, after the passage of New Jersey's 2012 Sports Wagering Law, indicated a new interpretation of this Court's anticommandeering precedent; however, the 2014 repeal of portions of New Jersey's wagering laws that the Third Circuit has held inconsistent with PASPA is a vast expansion of Federal power incompatible with this Court's prior jurisprudence. As a result of the 2014 repeal there is no Supremacy Clause issue, because PASPA's ability to conflict with repealed statutory provisions is wholly illusory.

The Federal government is free to regulate interstate commerce with broad authority. It is also free to prohibit sports gambling to the extent sports gambling implicates interstate commerce. The State of New Jersey is able to pass laws affecting sports gambling within the State, provided those laws are consistent with Federal law. Likewise, the New Jersey legislature is free to repeal its laws regulating sports gambling. New Jersey's repeal of its laws regulating sports gambling does not preclude the Federal government from passing its own laws to supplement the now absent State laws. The Federal government cannot require New Jersey to maintain and enforce its laws simply because they are amenable to Federal policy preferences. As Judge Kozinski of the Ninth Circuit noted in

a case involving medical marijuana laws in the State of California: "That patients may be more likely to violate Federal law if the additional deterrent of state liability is removed may worry the Federal government, but the proper response – according to *New York* and *Printz* – is to ratchet up the federal regulatory regime, *not* to commandeer that of the state." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (emphasis in original).

Congress has many avenues to encourage States to cooperate with their objectives. For instance, this Court has noted that Congress can direct Executive agencies to withhold a portion of related funds from the States in order to encourage States to pass laws in accordance with Congress' policy preferences. *See South Dakota v. Dole*, 483 U.S. 205 (1987). Indeed, the scheme that Congress devised in *New York* included numerous incentives for States to participate in the Federal nuclear waste disposal program. *See New York*, 505 U.S. 152-54 (1992). Nonetheless, the *New York* scheme failed to pass constitutional muster because of how it commandeered State legislatures to regulate according to Federal desires. In *Hodel*, this Court observed the absence of commandeering, in regards to a program where States were able to participate in a Federal regulatory program or propose their own program. *See Hodel v. Surface Mining & Reclamation Ass'n Inc.*, 452 U.S. 264 (1981). The *Hodel* regulatory choice meant that "[i]f a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory

burden will be borne by the Federal Government." *Id.* at 288. The Third Circuit's interpretation of anticommandeering precedent cannot be reconciled with this Court's holdings. There is no Federal regulatory program that New Jersey can opt to enter should it choose to repeal its gambling laws. Unlike the scenario in *Hodel*, if New Jersey repeals its laws governing sports gambling, the Federal government cannot begin prosecuting individuals (or corporate entities) in New Jersey for violating Federal laws *because there are none*. The Federal government lacks the ability to step in where New Jersey chooses not to enforce their criminal laws affecting sports gambling. The Federal government's "ban on sports wagering" is entirely cobbled together by predicate offenses based in State law.

The freezing of New Jersey's legislative powers is inconsistent with the power that the Federal government possesses. In *Printz*, this Court held that the Federal government could not use State law enforcement in order to execute a Federal prerogative to perform background checks on those wishing to purchase firearms. *See Printz v. United States*, 521 U.S. 898 (1997). "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935 (1997). The requirement that New Jersey maintain any portion of its sports gambling laws, and conceivably enforce those laws is wholly inconsistent with *Printz* because PASPA

as a civil statute relies on State law and State law enforcement to maintain criminal provisions to enforce Federal policy.

The failure of Congress to provide New Jersey with a choice "of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation," is inconsistent with the anticommandeering doctrine. *See New York*, 505 U.S. at 167 (1992) (citing *Hodel*, 452 U.S. at 288). A similar choice was the focus of *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 749-50 (1982) (asking States to give consideration to Federal regulatory standards, but not requiring States to adopt those standards), but there is no such choice presented to the state of New Jersey, since there is no Federal enforcement framework that New Jersey can adopt. There is only the command that the legislature may not "sponsor, operate, advertise, promote, license, or authorize by law or compact . . . " a sports wagering scheme. 28 U.S.C. § 3702(1). As was noted by the Ninth Circuit, "preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). PASPA has been utilized by the Respondents to circumvent the sovereignty of New Jersey's legislature and dictate the preferences of the Federal government to the citizens of New Jersey.

The Federal government is constitutionally restrained from commandeering State legislatures to

execute Federal policy preferences by the Tenth Amendment. The Federal government may not dictate to State legislatures which laws to enact, nor may they prohibit State legislatures from repealing their laws. Despite these restraints on Federal power, the Federal government has the authority to use various means to supplant State legislation that is incompatible with its own agenda. While PASPA cannot require States to take any affirmative steps to enact legislation, by handcuffing States from partially repealing their legislation the Third Circuit has vastly expanded the scope of Federal power.

A. The Professional and Amateur Sports Protection Act Does Not Fall Within Any Recognized Category of Preemption

While the Federal government can, and does frequently exercise its ability to preempt State law that is inconsistent with its goals, PASPA does not preempt New Jersey's repeal. PASPA creates the illusion that it has preemptive effect, but in actuality the statute does not exist within any of the categories of preemption or within quasi-accepted preemption doctrines. The Federal government may not force State legislatures to pass legislation, nor can it require State officials to enforce Federal statutes that regulate private individuals. *See Reno v. Condon*, 528 U.S. 141, 151 (2000). Congress can, however, preempt statutes and whole areas of regulation which interfere with the achievement of Federal objectives. Preemption may in fact be the most used and substantial power of the Federal government.

See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

PASPA does not contain a clause expressly preempting inconsistent State statutes. *See* 28 U.S.C. §§ 3701-3704. In *Cipollone*, this Court articulated the need to construe provisions "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). In *Medtronic v. Lohr*, it was noted that the approach of a presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." 518 U.S. 470, 485 (1996). Instead, PASPA created a convoluted grandfathering scheme allowing a hodgepodge of State gambling schemes to exist, which Justice Stevens noted that some of the exemptions were derived from "obscured congressional purposes." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999). PASPA does not contain a clause expressly preempting State statutes that are inconsistent. Not even a broad reading of PASPA could be interpreted to expressly preempt State law. PASPA commands those non-exempted States, by the various exemptions in section 3704, to not commit one of the six PASPA sins (sponsor, operate, advertise, promote, license, or authorize), *see* 28 U.S.C. § 3702, but is silent as to any intended express preemptive effect. The absence of an express preemptive effect from Congress must be read narrowly to conclude that PASPA does not preempt State law by any expression of intent. *See Cipollone*, 505 U.S. at 518; *see also Altria Grp. v.*

Good, 129 S. Ct. 538, 540 (2008) ("When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'").

Absent an express preemption clause within a statute indicating the intent of Congress to supplant inconsistent State statutes, the Federal government can effectuate its power by occupying the field in which it seeks to regulate. The Federal government may also pass a statute so all-encompassing that it is intended to occupy the entire field. In fields which Congress intends to occupy exclusively, this intent can be inferred from the "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress has not occupied the field of sports gambling. Instead, the Federal government has played an ancillary role with deference paid to individual State preferences. Indeed, much of the modern Federal statutory apparatus that supports the broad prohibition on sports wagering indicates that Federal legislation is supportive and deferential to State legislation. The Wire Act's Senate Report noted "[t]he purpose of this legislation is to assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling." S. REP. 87-588, at 3 (1961). Similarly, the Illegal Gambling Business Act and other acts

passed as part of the omnibus Organized Crime Control Act of 1970 requires a violation of State law in order for the statute to be triggered. *See* 18 U.S.C. § 1955(b)(1)(i). Without the predicate violation of State gambling law, the Illegal Gambling Business Act has no effect. The idea that Federal law is deferential to State preferences for the activities the State deems permissible is also found in the most recent Federal statute that directly implicates sports wagering. The Unlawful Internet Gambling Enforcement Act of 2006 contains a rule of construction which states: "No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). PASPA is alone in its requirements that State governments refrain from committing the six "sins." In fact, PASPA is the sole statute to directly implicate State regulation of sports gambling that does not articulate that State law leads in the realm of sports gambling while Federal law acts as a means to supplement the State.

The third of the major potential means for finding a preemptive effect of PASPA on State regulation is if there is conflict preemption. Obviously, if PASPA contains a provision that is inconsistent with New Jersey State law and PASPA is found to be a valid exercise of Congressional power, then PASPA would prevail. Similarly, if a New Jersey statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," that statute would be

preempted. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). There may be an argument that the 2012 Sports Gambling statute passed by New Jersey was preempted by PASPA. However, now there can be no conflict. It is an impossibility for a Federal law to present a conflict with a provision that no longer exists. *Black's Law Dictionary* defines repeal as "[a]brogation of an existing law by express legislative act." *Repeal*, BLACK'S LAW DICTIONARY (10th ed. 2014). The act of repeal annuls the previous provisions as though they were never present eliminating the mere possibility that Federal law could conflict with the absence of an offending provision. There is no impossibility of compliance with both Federal and State law in the matter presently before this Court because the Federal law requires that States not do something, and through repeal the State of New Jersey has not committed one of PASPA's enumerated sins.

PASPA's place in the Federal statutory landscape is uncertain. Counsel for the United States has expressed confusion and uncertainty over how PASPA interacts with State statutes. In response to a question at Oral Argument about whether PASPA was preemptive, counsel for the United States responded: "Technically I don't know the answer to that question." Transcript of Oral Argument at 56, *Christie I*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 13-1715). Despite the uncertainty expressed by counsel for the United States in *Christie I*, the Third Circuit in *Christie II* articulated that "States may not use clever

drafting or mandatory construction provisions to escape the supremacy of Federal law." Pet. App. 63a. The Federal government cannot similarly rely on State legislatures to maintain and enforce provisions that no longer serve the will of the State's citizens.

In *Christie I* the United States stated that New Jersey could repeal "in whole or in part" its sports betting prohibitions. Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-967, 13-979, & 13-980). That position was rejected by the Third Circuit in *Christie II* when it was determined that New Jersey's repeal was synonymous with authorizing sports gambling. That position is untenable. The freedom of State governments to repeal their own legislation is substantial. That being said, if the Federal government disagrees with the fact that New Jersey's repeal of its own laws renders State law inconsistent with Federal objectives, then to the extent the Commerce Clause allows, Congress can enact their own sports gambling laws that act as a prohibition. Indeed, this approach has been advocated by one of the Respondents, who called for a "federal framework." *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES, Nov. 13, 2014, http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?mcubz=0. Regardless of the social desirability of sports gambling, the Federal government has means by which it can stop such behavior and has not exercised them. Rather it has allowed PASPA to exist as a statute that gives the illusion of preemption without the

Federal government having to pay the political cost of removing revenue generating power from the States.

The interpretation that PASPA preempts New Jersey's ability to repeal its own laws creates a slippery slope. State level repeal of marijuana laws, and even "sanctuary cities," that have declined to provide aid or assistance to the Federal government in the enforcement of some Federal immigration laws are two relevant examples. PASPA raises a similar question as those faced by States which grappled with the legalization (or decriminalization) of both medical and recreational possession and sale of marijuana. A growing number of States have indicated a desire to discontinue the costly campaign of policing users of small amounts of marijuana.[2] Similarly, governments see little utility in maintaining and enforcing State laws against sports wagering. The question is to what extent do the States have to participate with Federal law enforcement and continue aiding with the achievement of Federal policy goals? *See* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 8 (2013). The Controlled Substances Act, in contrast to PASPA, explicitly states that the statute preempts State law to the extent "the two [laws] cannot consistently stand together." 21 U.S.C. § 903.

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[2] Unlike PASPA, which has no Federal criminal law implications and therefore does not implicate Federal law enforcement agencies, the Controlled Substances Act is connected to an extensive Federal law enforcement scheme via criminal penalties contained within Title 21 of the U.S. Code. *See, e.g.*, 21 U.S.C. § 841(b)(1)(B).

In the case of marijuana regulation, the Federal government would have had to carry the burden left by States who removed State and local barriers resulting in the responsibility for approximately 99% of all marijuana arrests. Mikos, 16 J. HEALTH CARE L. & POL'Y at 17. In the case of State legalization of sports gambling, the Federal government would lose an even greater share of their ability to enforce their policy wishes, because PASPA is not a criminal statute and the other relevant criminal statutes (*e.g.*, 18 U.S.C. §§ 1084, 1955) rely on State law violations. This leaves only State law to provide any substance to the Federal desires that sports betting be largely confined to Nevada. This burden should not be carried by the States. If the Federal government deems sports gambling or any other vice issue implicating their Commerce Clause powers to be a problem of "national concern" then they are able to implement and enforce their own policy. The Federal government cannot, however, force States to implement or maintain their own policies to achieve Federal objectives. The argument that New Jersey's 2014 repeal should be preempted by PASPA, and similarly that State marijuana repeals, legalizations and decriminalizations should be preempted because they obstruct Federal policy, leads to a result whereby States are required to enforce policy that is not only costly, but also inconsistent with the values of the citizens in many cases who voted for legalization. *See* Robert A. Mikos, *On The Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1474

(2009). Yet PASPA, via the Third Circuit's *en banc* opinion, is of even greater offense to preemption jurisprudence because there is no Federal law enforcement attachment. Therefore, the States must continue to enforce their sports gambling statutes using State law enforcement officers, who are paid from State budgets.

PASPA, as interpreted by the Third Circuit, is an unprecedented restraint on State sovereignty. Despite the fact that the State of New Jersey's citizens have articulated that a sports gambling prohibition is no longer desirable, the Respondents remain committed to their contention that PASPA should remain. At the same time, one has taken to lobbying in the *New York Times* for a Federal framework to regulate the practice. PASPA contains no provision that would give weight to the Third Circuit's preemptive finding in light of New Jersey's 2014 repeal. While the Third Circuit stated "[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of a particular word." Pet. App. 16a (citing *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83 (1990)). The contention that the Supremacy Clause is so strong that Federal legislation can overcome poor drafting and an ambiguous preemptive effect to usurp State legislative power is equally offensive to the Constitution and the historical role that States have played in regulating the private conduct of their citizens.

B. The Regulation of Sports Gambling is a Matter that Has Historically Been Left to the States

America's reliance on gambling has been often overlooked in modern conversation. America was built on gambling and those decisions were executed by the States. The Jamestown settlement was funded through a lottery more than 150 years before the ratification of the Constitution. Jerome H. Skolnick, *The Social Transformation of Vice*, 51 L. & CONTEMP. PROBLEMS 9, 16 (1988). The reliance on gambling, particularly lotteries, was indispensable to the development of both public and private projects during early American history, with portions of the Revolutionary War having been financed through local lotteries. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992). During the pre-revolutionary war period, the prominence of lotteries was largely determined by local sensibilities; for instance, in "Pennsylvania, where the Quakers had political power, [the Quakers] regulated lotteries more heavily than other states." *Id.* at 27. These "State-conducted lotteries prospered into the early years of the nineteenth century and played an important role in the westward expansion of the nation." *Id.* at 31. While State and local lotteries have played an important role in funding the development of many of the country's premier educational institutions, they also funded western exploration.

Even though lotteries enabled exploration of many of the western States, several of these States elected to explicitly ban lotteries in their new Constitutions. *See* I. N. Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFREY S. MOORAD SPORTS L.J. 361, 369 (2010). As lotteries began to fall out of favor, States had the primary responsibility for regulating their prohibitions through the middle portion of the Nineteenth Century. *Id.* Other gambling activities during this era were also left to State legislatures to regulate (or more commonly, not regulate). *Id.* at 370. It was not until the lotteries began to impact more States than those where they had originated, that the Federal government passed a law in 1890, banning the use of the mail for distribution of lottery materials. Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465. It was the lack of the States' ability to constrain the activity within their borders that necessitated the Federal intervention. 18 U.S.C. § 1301. Similarly, when lottery operators began circumventing the use of the mail by using private couriers and holding lotteries at sea, Congress used its powers under the Commerce Clause to target the lottery operators who sought to evade the ban on the use of the mails. *Id.* at 374. This controversial use of the Commerce Clause was upheld by this Court in *Champion v. Ames*, 188 U.S. 321 (1903), and *Francis v. United States*, 188 U.S. 375 (1903), otherwise known as the "*Lottery Cases*." Two years later this Court stated that "[t]he suppression of gambling is concededly within the police powers of a State, and legislation prohibiting it, or acts which may tend to or facilitate it, will

not be interfered with by the court unless such legislation be a 'clear, unmistakable infringement of rights secured by the fundamental law.'" *Ah Sin v. Wittman*, 198 U.S. 500, 505-06 (1905) (citing *Booth v. Illinois* 184 U.S. 425, 429 (1902)).

In 1931, Nevada re-authorized casino gambling, setting the stage for more than 20 other States to begin operating and regulating racetracks and pari-mutuel betting facilities. I. N. Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 JEFFREY S. MOORAD SPORTS L.J. 361, 374 (2010). The Twentieth Century approach to regulation of gaming activities has been largely the same as the approach taken in previous eras. The States define which activities are permissible and the Federal government has periodically passed legislation to assist the States where activity extends into areas beyond the reach of the States. For instance, prior to passage of the Wire Act in 1961, then-Attorney General Robert F. Kennedy testified that the legislation was necessary to address the very specific problem of targeting the funds that allow "gambling" kingpins to live outside the jurisdiction of State law enforcement officials and remain beyond the reach of State law. *Legislation Relating to Organized Crime Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcommittee No. 5 of the Committee of the Judiciary*, 87th Cong. at 22 (1961) (statement of Robert F. Kennedy). The Wire Act's Senate Report similarly notes the States' primary role in enforcement of relevant law, articulating the

purpose of the statute is "to assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities. . . ." S. REP. 87-588, at 2 (1961). Additionally, the statutory text itself acknowledges that the Wire Act provides safe harbor for transmissions between States (or foreign jurisdictions) where the implicated activity is legal. *See* 18 U.S.C. § 1084(b).

The Illegal Gambling Business Act, passed as part of the omnibus Organized Crime Control Act of 1970, requires a predicate violation of State law effectively limiting the role of Federal agencies to one of supporting State law enforcement. *See* 18 U.S.C. § 1955(b)(1)(i). Similarly, the Interstate Horseracing Act contains the congressional finding that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1). In addition to acknowledging the primary role of the States, the statute also includes the congressional finding that the Federal government should act to prevent one State from interfering with the gambling policies of another. 15 U.S.C. § 3001(a)(2). Despite these historic findings, PASPA has emerged as an anomaly, an isolated statute that seemingly ignores decades of Federal policy yet is sufficiently aware of certain State reliance interests so as to not abridge them. Efforts were made to pass new legislation that would ban wagering on amateur sporting events and create a new criminal offense in 2001. Even with this proposed new law, the Congressional Budget Office acknowledged that much of the cost burden would be

borne by State law enforcement. *See* S. REP. 107-16, at 7 (2001). Though the *Amateur Sports Integrity Act* did not become law, the next directly relevant statute to sports gambling, the *Unlawful Internet Gambling Enforcement Act*, also acknowledged the primacy of State law and the supporting role of Federal legislation. The statute passed in 2006, notes "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361 (b). Despite the history of gambling policy in the United States that extends to prior to the unification of the States, the Federal government could regulate the field of sports gambling or make sports betting a Federal criminal offense; however, they have not done so. PASPA does not criminalize sports betting, PASPA does not preempt the field of sports gambling, PASPA does not expressly preempt any statute, and PASPA cannot preempt the 2014 New Jersey repeal because it is an impossibility for PASPA (or any other statute) to conflict with something that does not exist.

II. Sports Gambling Should Not Automatically Implicate the Commerce Clause

Congress has an undisputed ability to regulate interstate commerce, and some sports gambling schemes implicate interstate commerce. But as Justice O'Connor noted in her dissent in *Gonzales v. Raich*: "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility

that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (citing *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting)). In the case of sports betting, that courageous state appears to have been Nevada, who most certainly built a gambling empire on the back of interstate commerce. Yet, contrary to the holding of the District Court in 2013, not all modern sports gambling schemes meet the congressional findings that served as the basis of the New Jersey District Court's holding. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 558-60 (D.N.J. 2013).

The four-factor test applied in *United States v. Lopez*, 514 U.S. 549, 559-67 (1995) and *Morrison v. United States*, 529 U.S. 598, 609-13 (2000) raises questions about some sports gambling schemes that are seemingly implicated under PASPA. The first factor is whether the statute in question regulates economic activity that "substantially affects interstate commerce." *Id.* at 610. PASPA is unattached to a Federal regulatory scheme, because the ancillary statutes that are often cited as related to PASPA rely on individual State regulations to sustain their existence. While some State sports gambling schemes would most certainly impact interstate commerce, the Respondents have suggested that not all schemes would offend their interpretation of PASPA. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (Nos. 14-4546, 14-4568 & 14-4569).

The second factor established in *Lopez* and applied in *Morrison* asked whether the statutes contained an express jurisdictional statement, reflecting Congress' intent to regulate interstate commerce. *Morrison*, 529 U.S. at 611-12. PASPA contains no express jurisdictional statement establishing its connection to interstate commerce. The third factor, under the *Lopez* and *Morrison* test, is an examination of the legislative history of the statute to determine whether the statute's legislative history contained findings regarding the impact on interstate commerce. *Id.* at 612. While PASPA does contain articulations from Congress that sports gambling may implicate interstate commerce, many of the Congressional findings now appear to no longer support the need for PASPA. For instance, the District Court cited the congressional finding that "[t]he spread of legalized sports gambling would change forever – and for the worse – what [professional and amateur sports] games stand for and the way they are perceived." *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 558 (D.N.J. 2013). Interestingly, now one of the Respondents has advocated for the advantages of legalized sports betting. *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES, Nov. 13, 2014, http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?mcubz=0. Similarly, it is unclear as to how compelling "the interstate ramifications of sports betting . . . for federal legislation," remain given the rampant spread of so-called daily fantasy sports, which have not been the subject of a single PASPA injunction. *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d

551, 559 (D.N.J. 2013). Additionally, within PASPA's legislative history are minority views expressed by Senator Grassley who stated: "The majority also attempts to establish that this legislation is consistent with existing Federal law. Nothing could be further from the truth. The Federal Government has never sought to regulate purely intrastate wagering activities." S. REP. 102-248, at 12 (1991). Finally, the fourth factor calls for an examination of whether certain sports betting schemes "may affect the national economy." *Gonzales v. Raich*, 545 U.S. 1, 45 (2005). In *Lopez*, it was observed that the connection between gun possession and interstate commerce "was attenuated." *Morrison*, 529 U.S. at 612 (citing *Lopez* 514 U.S. at 563-67). The argument that sports gambling leads to organized crime and other problems of national importance may have some validity, but like this Court's observation in *Morrison* such arguments associated with "costs of crime" and "national productivity" used to justify Commerce Clause legislation may lead to Congress having the ability to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Morrison*, 529 U.S. at 613 (citing *Lopez* 514 U.S. at 564). Similar to the legislation challenged in *Lopez*, PASPA creates an expansion of Federal power that intrudes into activities that can have little impact on interstate commerce.

This Court has held that gambling does not implicate a constitutionally protected right and is often banned all together, *United States v. Edge Broad. Co.*,

509 U.S. 418, 426 (1993), but that is not what has occurred here. Instead, Congress has determined that while sports gambling may implicate the Commerce Clause, the national concern is not of sufficient merit to abridge the rights of at least ten states to offer some form of sports betting activity. *See* Ryan M. Rodenberg & John T. Holden, *Sports Betting Has An Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 16 (2017). The dissenting views of Senator Grassley, memorialized in the Senate Report, note the slippery slope of couching PASPA as a valid exercise of Commerce Clause legislation: "this legislation would set the dangerous precedent that the Federal Government can prohibit any State revenue raising program, under the guise of 'interstate commerce,' at the behest of any special interest." S. REP. 102-248, at 12 (1991). Not all sports gambling schemes are likely to implicate the Commerce Clause, as the Respondents themselves have articulated that a so-called "friends and family plan" of sports betting where bets of up to $1,000 may not offend PASPA. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (Nos. 14-4546, 14-4568 & 14-4569). This proposal by Respondents' counsel begs the question: Why do PASPA's restrictions not reach the "friends and family plan," but the state-sanctioned plan does? *See* 28 U.S.C. § 3702(1)-(2). It is an odd situation where certain conduct between private parties does not seemingly trigger the reach of the Commerce Clause, but the State performing the same function does.

CONCLUSION

PASPA raises serious Federalism concerns; this fact was true in 1991 and remains true today. *See* Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph W. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). While on the surface PASPA appears to be part of a Federal regulatory apparatus because of the existence of other statutes implicated by gambling activities, upon closer examination all the statutes rely on the primacy of State law. This reliance on State law in conjunction with a lack of preemptive intent through express means, renders PASPA's preemptive effect largely illusory, and in the context of New Jersey's repeal of portions of their own laws PASPA's preemptive effect is non-existent. There is no longer a statutory provision to trigger a conflict.

While the Supremacy Clause acknowledges the paramountcy of Federal law, the compromise of the Constitution's framers was to provide expansive powers to the States, while the Federal government maintained a narrow sphere of oversight. *See* U.S. CONST. art. VI, cl. 2; *see also Printz*, 521 U.S. 898, 918-22 (1997). PASPA, as applied to the factual scenario of New Jersey's statutory repeal, is such that it is wholly incompatible with this Court's anticommandeering jurisprudence. PASPA does not offer States the opportunity to regulate sports gambling or have the Federal government regulate and enforce the practice. Instead, PASPA requires States not to pass new regulations or

modify existing regulations while they continue to enforce, at their own expense, the provisions their citizens decried overwhelmingly that they did not want. *See* Pet. App. 27a. PASPA forces Federal policy decisions and differentiations on the citizens of the States; this has a potential immense trickle-down effect on States that have articulated different views from a wide variety of policy concerns including those who regulated marijuana in contravention of the Controlled Substances Act.

Beyond PASPA's affront to State sovereignty and the autonomy of State legislators and law enforcement officials in direct violation of *Printz* and *New York*, PASPA as interpreted is a moving target for when the statute is implicated. The ideas that formed the foundation for Congress to conclude that regulating sports gambling was addressing a "national concern" have changed. Similarly, the types of activities that once implicated by default interstate commerce can now be confined to the borders of individual States, and in the case of a wide-spread sports gambling product endorsed by a majority of the Respondents, these geographic restrictions have been quite successful. While some sports gambling activities can conceivably implicate interstate commerce, given the tight controls of other State-regulated gambling activities, this should not be the default position.

For these reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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